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# HARVARD LAW REVIEW

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STATUS OF ALIEN ENEMIES<sup>1</sup> IN COURTS OF JUSTICE. — “The authorities show that, though an alien enemy cannot sue in the courts of this country, he can be sued.” The Attorney-General, as *amicus curiae*, in *Porter v. Freudenberg*, [1915] 1 K. B. 857, 863, thus summed up the situation of alien enemies in the courts of justice.<sup>2</sup> There are so many circumstances under which the question of the status of alien enemies<sup>3</sup>

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<sup>1</sup> The expression “alien enemies” is not a happy one. The persons intended to be described by it are not necessarily aliens; they may be neutrals or even subjects of the home state. See note 3. “Enemy aliens” is no better, for the same reason. “Enemy” is more accurate, but is perhaps likely to be understood in a more popular sense of an opposing military force or of a hostile state. “Enemy” is the term used in the Trading with the Enemy Act enacted by Congress and approved October 6, 1917.

<sup>2</sup> The Lord Chief Justice in delivering the opinion of the Court of Appeal gave the following reasons for the rule (page 880): “To allow an alien enemy to sue or proceed during war in the civil Courts of the King would be . . . to give to the enemy the advantage of enforcing his rights by the assistance of the King with whom he is at war. But to allow the alien enemy to be sued or proceeded against during war is to permit subjects of the King or alien friends to enforce their rights with the assistance of the King against the enemy. *Prima facie* there seems no possible reason why our law should decree an immunity during hostilities to the alien enemy against the payment of just debts or demands due to British or neutral subjects. The rule of suspending the alien enemy’s right of action is based upon public policy, but no considerations of public policy are apparent which would justify preventing the enforcement by a British or neutral subject of a right against the enemy.”

<sup>3</sup> Who is an alien enemy? “Its natural meaning indicates a subject of enemy nationality, that is, of a State at war with the King, and would not in any circumstances include a subject of a neutral State or of the British Crown, but that is not the sense in which the term is used in reference to civil rights. . . . It is clear law that the test [for the purpose of the enforcement of civil rights] is not nationality but the

may arise that a more detailed examination seems desirable. For example, in considering the rule that an alien enemy cannot sue, does it make any difference whether the suit is brought before or after the outbreak of war? In *Le Bret v. Papillon*, 4 East, 502, the plaintiff in an action of assumpsit was an alien friend at the time he brought the action, but war broke out before the plea was filed. Lord Ellenborough held the plaintiff barred from further maintaining his action.<sup>4</sup> In each of two recent cases, *Plettenberg v. Kalmon*, 241 Fed. 605, District Court, S. D. of Ga., and *Stumpf v. Schreiber Brewing Co.*, 242 Fed. 80, District Court, W. D. of N. Y., an action was brought before the war by a German subject, in the first case to recover a balance of account for goods sold, and in the second case for the infringement of letters patent. In each case the court ordered a suspension of the proceedings until peace, and not a dismissal of the action.<sup>5</sup>

Under the English and American law, therefore, an alien enemy cannot begin an action, nor, if the action had been begun before the outbreak of war, can he continue its active prosecution.<sup>6</sup>

Such was also the French law until the close of the Napoleonic wars.<sup>7</sup>

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place of carrying on business." [1915] 1 K. B. 867, 868. It will be noticed that the test is not whether the party is personally present in (a) enemy territory or (b) the home or neutral territory, but the place of carrying on business. That is to say, one may be an alien enemy, and yet be present in the home territory. This is to be borne in mind in considering on the one hand the possibility of securing service of a writ on an alien enemy, and on the other hand the possibility of his appearing and defending an action against him. However, the typical case of an alien enemy is one who is carrying on business in hostile territory, and is present there. *Ibid.*, 869.

By section 15 of the British Trading with the Enemy Amendment Act, 1916, the expression "enemy subject," as used in the Act, is defined as the subject of a state for the time being at war with the King.

<sup>4</sup> In *Robinson v. Continental Ins. Co.*, [1915] 1 K. B. 155, counsel contended that the decision in *Le Bret v. Papillon* must be taken to have been reversed by *Flindt v. Waters*, 15 East, 260. But the last-mentioned case seems to have turned on a point of pleading.

<sup>5</sup> Where, however, the alien enemy is present in the home country by permission of the sovereign of the latter, he may maintain an action; *Princess of Thurn & Taxis v. Moffitt*, 31 Times L. R. 24.

In *Sparenburgh v. Bannatyne*, 1 B. & P. 163, a prisoner of war was allowed to sue in assumpsit for wages earned by him while a prisoner.

*Plettenberg v. Kalmon*, *supra*, was followed in *Speidel v. Barstow Co.*, 243 Fed. 621 (District Court, R. I.), where all the plaintiffs were German subjects, but some of them lived in Germany, and others in the United States.

<sup>6</sup> The extraordinary misunderstanding in regard to the meaning of article 23 (h) of the Regulations Respecting the Laws and Customs of War, annexed to IV Hague Convention (1907) is discussed in [1915] 1 K. B. 874-80. Article 23 (h) states that: "In addition to the prohibitions provided by special Conventions, it is particularly forbidden . . . (h) To declare abolished, suspended or inadmissible the right of the subjects of the hostile party to institute legal proceedings." Germany and France maintained that the acceptance of this article compelled the United States and Great Britain to abolish their rule that enemy subjects may not sue. But the United States and Great Britain maintained (and so the Court of Appeal held) that the article had nothing to do with the municipal law of these countries but concerned only the conduct of armies in occupied territory. See 2 OPPENHEIM, INT. LAW (2 ed.) 134.

<sup>7</sup> In 1704 the Parliament of Douai decided that "pendant la guerre un sujet d'une domination ennemie ne pouvait agir contre un sujet du Roy, d'autant plus que Sa Majesté défendait par ses édits et déclarations d'avoir aucune communication avec les ennemis." Pinault des Jaunaux, tome 3, § 62. See also MERLIN, RÉPERTOIRE, MOT "GUERRE."

But "in fact, never, since this epoch, even during the Franco-Prussian war of 1870-71, has the French Government prohibited the nationals of the States with which we were at war from exercising in France the same rights as in times of peace, unless, of course, their acts were of such a nature as to imperil the interests of the national defense."<sup>8</sup>

If, however, it be true that such a relaxation of the former rule had been established before the present war, it is at least doubtful whether the milder view prevails today. Conflicting opinions have been expressed by the French tribunals. A judgment of the court of Paris (fourth chamber), April 20, 1916, is favorable to the alien enemy, admitting his right to appear but suspending the execution of a judgment in his favor if the result of carrying it out would be injurious to France. On the other hand, an opinion by the Tribunal of the Seine, May 18, 1916, denies to alien enemies the right to appear in a court of justice.<sup>9</sup> In the last-mentioned case the court laid stress on the "numerous, tragic, and cynical violations by Germany" of the obligations resting upon belligerents.<sup>10</sup>

According to a judgment of the *Reichsgericht*,<sup>11</sup> October 26, 1914, the German law provides for alien enemies the same protection which is accorded to foreigners in time of peace. But in view of the principle of reciprocity (which is favored in the law of continental Europe) it seems probable that the rights of alien enemies in German courts will as far as possible be placed on the same basis as the rights accorded to German subjects (being alien enemies) in the courts of the various countries with which Germany is at war.<sup>12</sup>

War legislation has also affected this subject. For example, the German government, on September 30, 1914, prohibited the payment of sums due in Great Britain and Ireland, and, on October 20, 1914, of sums due in France. It is said that this does not prevent a creditor domiciled in Great Britain or France from instituting an action, but he cannot secure payment of his debt.<sup>13</sup> The legislation appointing an official (known in England as the Custodian of Enemy Property; in France, as the *séquestre*; in Germany, as the *Vertreter*; in the United

<sup>8</sup> Professor VALÉRY (University of Montpellier), 42 CLUNET, 1012.

<sup>9</sup> Both are reported in 23 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, 380-386.

<sup>10</sup> French writers give the same explanation for the refusal to extend to alien enemies in the present war the right to appear in French courts of justice. "Tenons donc pour acquis qu'à l'heure actuelle l'accès de nos tribunaux est interdit aux ressortissants des États ennemis. Mais il est clair que cette règle n'ayant été établie qu'en haine de ces personnes, nos nationaux ne doivent pas avoir à souffrir de son application," VALÉRY, in 42 CLUNET, 1015. So COURTOIS, *ibid.*, 513.

Compare with this Marshall, C. J., in *The Nereide*, 9 Cr. 388, 422: "The court is decidedly of opinion that reciprocating to the subjects of a nation, or retaliating on them, its unjust proceedings towards our citizens, is a political not a legal measure. It is for the consideration of the government, not of its courts."

<sup>11</sup> 42 CLUNET, 785.

<sup>12</sup> On the eve of his departure from London, in August, 1914, the German Ambassador informed the British Foreign Office that "in view of the rule of English law, the German Government will suspend the enforcement of any British demands against Germans unless the Imperial Government receives within twenty-four hours an undertaking as to the continued enforceability of German demands against Englishmen." No such undertaking was given. See [1915] 1 K. B. 879.

<sup>13</sup> 42 CLUNET, 790.

States, as the Alien Property Custodian) to take over the property of alien enemies, should also be noted. In so far as this official has authority to collect the property of enemy aliens, it seems only proper that he should have the right to bring and defend actions in connection therewith.<sup>14</sup>

The most difficult questions seem to arise under the second part of the Attorney-General's summary, namely, that an alien enemy can be sued. This statement is reiterated almost without a dissent.<sup>15</sup> But perhaps certain distinctions should be made. If an alien enemy happens to be present in the home country, he may be served with process. But in most instances he is not only resident in hostile territory but he is actually there. How can he be reached by legal process? If he has property within the home jurisdiction, that property may be seized and adjudicated upon in his absence. To be sure, it is customary to give notice by publication in some form, and a distinction may be drawn between such a notice in time of peace (when, if it reaches the defendant, he may appear and answer) and in time of war (when he has no right, because of the rule of non-intercourse, to come into court). However, it is not the publication of notice which confers jurisdiction, but the presence of the property within the jurisdiction.

Where the defendant had an agent in the home country, appointed before the outbreak of war, the Court of Appeal in *Porter v. Freudenberg*<sup>16</sup> was of opinion that substituted service might be made on the agent, though it left open to the judge at chambers to impose further terms as to advertisement or other means of communication. But this places the agent in an awkward position, for if he desires additional instructions from his principal, how is he to obtain them except by communication across the line of war? And suppose (as is more likely to be the case) there is no pre-appointed agent? The court in *Porter v. Freudenberg*<sup>17</sup> is quite clear that the alien enemy may be sued, although it admits that there was no direct decision to that effect until the case of *Robinson v. Continental Ins. Co. of Mannheim*.<sup>18</sup> But the court also points out (page 887) that the alien enemy is, according to the fundamental principles of English law, entitled to effective notice of the proceedings against

<sup>14</sup> Section 12 of our Trading with the Enemy Act provides that the custodian shall be vested with all the powers of a common-law trustee in respect of all property, other than money, which shall come into his possession. As to France, see 42 CLUNET, 1019. As to England, see *Cotinho Caro & Co. v. Vermont & Co.* [1917] 2 K. B. 587.

<sup>15</sup> Dr. Baty, with characteristic independence of mind, enters a protest. "It is perfectly inconsistent with the whole doctrine of the suspension and cancellation of contracts, as well as with the substantial reason for non-intercourse (namely, the danger of permitting communication) and the historical reason (namely, the want of a *persona standi in judicio*), that an alien enemy should be capable of being sued during war. How can he properly defend himself? His position would be most unfortunate and most unjust." BATY AND MORGAN, WAR, 288.

<sup>16</sup> [1915] 1 K. B. 857, 890.

<sup>17</sup> *Ibid.*, 882.

<sup>18</sup> *Ibid.*, 155. In that case a British subject had brought an action against a German insurance company, and the pleadings had been closed, before the outbreak of war. An application was made by the defendant to stay the action during the war. The application was refused.

According to *Halsey v. Loewenfeld*, [1916] 1 K. B. 143, while an alien enemy may defend a suit brought after the outbreak of war, he cannot have process to bring in third parties who he claims should indemnify him.

him,<sup>19</sup> and (page 890) that "there is little, if any, value in obtaining judgment in our courts in default of the appearance of the defendant resident in an enemy State, unless there is property in this country which can be reached in execution of the judgment."<sup>20</sup>

By the Legal Proceedings against Enemies Act (5 GEO. V, c. 36), where a British subject brings an action against an alien enemy claiming a declaration as to the effect of the present war on rights or liabilities of the plaintiff or defendant under a contract entered into before the outbreak of war, leave may be given to issue a writ of summons for service out of the jurisdiction under certain circumstances.<sup>21</sup>

What is the situation as to appeals brought after the outbreak of war? In *Porter v. Freudenberg*<sup>22</sup> a distinction was drawn between an appeal by an alien enemy defendant and by an alien enemy plaintiff. In the first, the right to appeal followed as an incident of the fundamental right of the defendant to appear and defend.<sup>23</sup> But in the second, the right of appeal was denied on the same principle which prohibits the alien enemy from bringing an action.

The difficulties by which the courts are faced in cases where an alien enemy is a party arises out of the desire of the judges (by training and experience, and on principle) to do justice between the parties litigant,<sup>24</sup> and the impossibility of dealing fairly with both sides under the abnormal conditions of war. Suppose the plaintiff claims a lien on property within the home jurisdiction, but the owner is an alien enemy in hostile territory. The property is within the jurisdiction of the court, and may be dealt with by it; but under the rule of non-intercourse, the owner

<sup>19</sup> By our Trading with the Enemy Act, § 3, par. (c), it is unlawful to send, take, or transmit out of the United States any letter or other writing, or any telegram, cablegram or wireless message or other form of communication intended for or to be delivered, directly or indirectly, to an enemy or ally of enemy. Provision is made for licenses by the President. It seems, therefore, that in the absence of license, it is unlawful to send a notice to a defendant in Germany. But suppose that in some way the defendant in Germany becomes aware of the suit pending, may he appoint counsel in the United States to represent him? Section 2, par. (c) of the act includes in trading with the enemy, the performing of "any contract, agreement, or obligation." This language appears broad enough to prohibit counsel from accepting the charge of litigation. It is, of course, open to judicial interpretation by which a license might be implied permitting intercourse for purposes of litigation.

<sup>20</sup> French writers, while insisting that an alien enemy is liable to be sued, have felt the same difficulty as to the effect of a judgment by default against him. See COURTOIS, 42 CLUNET, 512; VALERY, *ibid.*, 1019.

<sup>21</sup> "No relief other than a declaration is asked for, and it would appear that no other relief could be given, for on the whole I think the plain intention of the act is to limit the relief which can be granted to some form of declaration of rights. The result appears to be that, though rights can be conclusively declared by the Court, the British subject must wait until the end of the war before the Court can enforce those rights, and then, apparently, he must proceed by a second action, and again serve his ex-enemy defendant, in order that the Court may make orders enforcing rights which it has already authoritatively ascertained and which it cannot alter. I find it difficult to understand the principle underlying this legislation, but my duty is to act upon it." Atkin, J., in *Stevenson & Sons, Ltd. v. Aktien-Gesellschaft*, [1916] 1 K. B. 763, 766.

<sup>22</sup> [1915] 1 K. B. 357, 383-384.

<sup>23</sup> See *McVeigh v. United States*, 11 Wall. 259, commented on in BATY AND MORGAN, WAR, 289.

<sup>24</sup> "We should be anxious to give the Russian plaintiff, though an enemy, every advantage which the law of England gives him." Lord Campbell, C. J., in *Alcinous v. Nigreu*, 4 E. & B. 217 (1854).

cannot be reached with notice to come and defend. To proceed, seems an injustice to the enemy; but to postpone the litigation until the close of the war will be unjust to the loyal plaintiff. Under the circumstances, it is only to be expected that the court will proceed.<sup>25</sup> The case where an attempt is made to secure a merely personal judgment against the alien enemy does not offer serious difficulty. Since such a judgment is admittedly valueless,<sup>26</sup> the court should apply the ordinary rule, and confess that it has no jurisdiction.

The position of an alien enemy in a prize court has been discussed in English cases during the present war. In the first case decided by the Prize Court<sup>27</sup> the question was mentioned, but it was not necessary to decide it.<sup>28</sup> But in *The Moewe*<sup>29</sup> an appearance was entered by the German owners of the captured vessel, who claimed her under VI Hague (1907). The Attorney-General, on behalf of the Crown, admitted that in a prize court an alien enemy might appear if he could show that "*pro hac vice* he stood in a position which relieved him from the pure enemy character."<sup>30</sup> The President of the Prize Court, while convinced that in the days of Lord Stowell and Dr. Lushington the right of an enemy claimant to appear was limited,<sup>31</sup> extended the right to anyone who conceives that he is entitled to any protection, privilege, or relief under any of the Hague Conventions. This is right. Prize courts are instituted for the express purpose of deciding upon questions of private rights arising out of the existence of a maritime war. Their proceedings are *in rem*, and their judgments are conclusive as to the title of the property before them.<sup>32</sup> It is, therefore, proper that anyone who claims an interest in the *res* should be permitted to appear.<sup>33</sup>

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RACE SEGREGATION ORDINANCE INVALID. — The opinion in *Buchanan v. Warley*<sup>1</sup> reflects the confusion and difficulty of that troublesome prob-

<sup>25</sup> But in *Haymond v. Camden*, 22 W. Va. 180, the court, after the civil war, set aside the enforcement of a purchase-money lien on land, the enforcement having been obtained during the war.

That a power of sale under a deed of trust may be exercised during war, see *University v. Finch*, 18 Wall. 106. Where a debtor went over the line into the Confederacy, attachment proceedings against his property were held valid. *Ludlow v. Ramsey*, 11 Wall. 581. But where he was sent across the line by the federal military authorities, held, no foreclosure of a mortgage made by him should be allowed; *Dean v. Nelson*, 10 Wall. 158; *Lasere v. Rochereau*, 17 Wall. 437.

<sup>26</sup> See note 20.

<sup>27</sup> *The Chile*, [1914] 212.

<sup>28</sup> So also *The Marie Glaeser*, [1914] 218.

<sup>29</sup> [1915] 1.

<sup>30</sup> "A claimant in a prize court is not in a position analogous to that of a defendant, but rather to that of a plaintiff." Sir Samuel Evans, [1915] 1, 17.

<sup>31</sup> In *The Hoop*, 1 C. Rob. 196, Lord Stowell mentions: coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts the enemy in the King's peace. To these Story adds a license or a treaty; 1 Wheat. (App.) 500.

<sup>32</sup> *Marshall, C. J.*, in *The Fortitude*, 7 Cr. 423.

<sup>33</sup> Does this imply a license to communicate across the line of war for the purpose of litigation? That point was not discussed in the above cases. Perhaps it was not necessary to consider it, since the master is always present and he may represent the interests of all parties concerned with the captured ship or its cargo.

<sup>1</sup> October Term, 1917, No. 33.